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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

NO. 305

ATLANTIC COAST LINE RAILROAD COMPANY,

Petitioner,

v.

W. D. FIDD,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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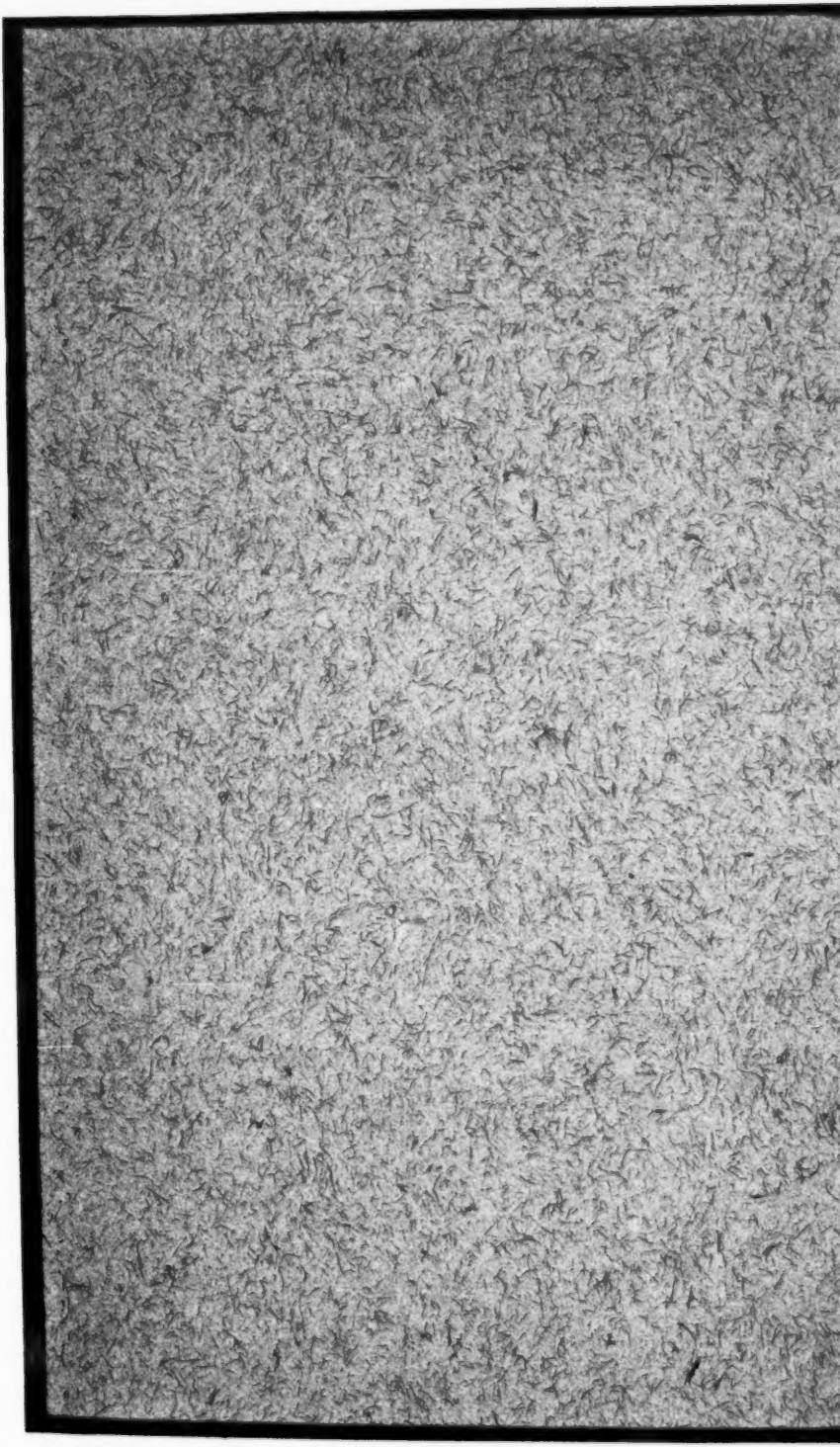

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STATUTES CITED

Florida Statutes, 1941 (and 1949):

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OPINION BELOW

The opinion of the Court of Appeals is reported in 197 F. 2d 153, and appears in the record at page 376. The opinion affirms jury verdict and judgment of the District Court in plaintiff's favor (R. 30). No opinion was rendered by the District Court.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under 28 U. S. Code, Section 1254(1).

Respondent respectfully urges that this is not a case in which this Court should accept jurisdiction. Objections to the jurisdiction are included in our Argument.

QUESTION PRESENTED

As we view it, the real question is:

Has the petitioner clearly demonstrated that the Court of Appeals has decided an important question of Florida law in a manner in conflict with the decisions of the Supreme Court of Florida?

STATUTES INVOLVED

The pertinent statutory provisions are Sections 320.45, 768.01, 768.02 and 768.06, Florida Statutes, 1941 (and 1949). They are printed in the Appendix to the railroad's petition.

STATEMENT

Petitioner ignores many important facts and circumstances. We feel obliged to supplement its statement.

The decedent was a stranger in the State of Florida, wholly unfamiliar with the locality of the accident and the crossing itself (R. 97-98). U. S. Highway 441 runs from Ocala to Leesburg, Florida. The railroad's track crosses the highway at an angle of about 35 degrees on the outskirts of the Town of Oklawaha. Mrs. Pidd was driving on the highway from west to east proceeding from Ocala toward Leesburg, while the train came from the southeast. Thus as Mrs. Pidd approached the intersection, the train came from her right.

U. S. Highway 441, at the intersection in question, is one of the most heavily traveled highways in the State of Florida (R. 167-168, plaintiff's exhibit 7). The accident occurred

on Saturday afternoon, with many automobiles going to and from town. The heavy automobile traffic over this intersection was well known to the operators of the train; they knew the traffic was unusually heavy on Saturday afternoons (R. 261-262).

This is no isolated rural crossing, as petitioner implies, but a much used and heavily traveled United States and Florida highway, a fact alone calling to the attention of the railroad that it was a place of great danger. The railroad also is charged with knowledge that Florida is a tourist state and that many of the constantly crossing automobiles at this intersection were, like decedent's, out-of-state cars driven by persons completely unfamiliar with the crossing.

Petitioner has not called attention to the highly dangerous nature of the crossing, existing because of physical obstructions to the view of both motorist and the train crew. As shown by the testimony of the witnesses (R. 71, 98, 129-131, 150-152, 194-198) and the photographs in evidence, the obstructions of trees, foliage, dense underbrush and other objects make it impossible to see any appreciable distance down the track until the motorist is almost upon the crossing. The Court of Appeals particularly noted the blind and obstructed nature of the crossing (R. 378). There were no blinker lights, cross bars or gates at the intersection and no warning devices of any description other than the usual railroad signs (R. 63, 99, 129, 245).

The railroad makes much of the fact that there were three railroad signs on Mrs. Pidd's right side, warning her that she was approaching a crossing. The first is the round State Road Department sign, located 284 feet from the crossing. The second is the "Stop, Fla. Law, RR Crossing" sign, located 198 feet from the crossing. *But note the confusing location of the third sign, the usual "cross buck" shown in defendant's Exhibit A.*

Even the railroad's trial counsel, interrogating the witness Andrews with respect to defendant's Exhibit A, a photograph he had had ample time to study, thought that the third sign was on the *near side* of the crossing (R.80). But the third sign on Mrs. Pidd's right, the "cross buck", actually is on the *far side* of the railroad track (plaintiff's Exhibit 2, 6, 8, 10). Thus the railroad track is actually located *between* the second and third signs on Mrs Pidd's right; it is not located, as any reasonable person approaching the crossing would presume from the signs, *beyond* the third or last sign on the approaching motorist's right.

The railroad says that it is not responsible for the erection, location or maintenance of the signs, but that is no answer. The engineer and other trainmen had crossed this highway many times and, as admitted in the railroad's petition, they obviously knew of the location of the signs. They are charged with knowledge that the confusing location of these signs to a motorist approaching as was Mrs. Pidd added much to the perilous nature of the crossing.

The record is replete with evidence showing that the train went across the intersection at a very fast and undiminished speed, wholly inconsistent with the highly dangerous, obstructed nature of the crossing. Five independent witnesses stated that the train reached the crossing at a speed as high as 60 miles per hour and that it made no effort whatsoever to stop or slow down before it reached the intersection (R. 63, 116, 129, 277, 287). One of the railroad's witnesses, who lives right at the intersection, testified that *the train was going faster than usual* (R. 298). The engineer reluctantly testified that the train was running at least several minutes late and that the best place to pick up lost speed is on a straight-away track such as here existed (R. 249, 256, 257).

In addition to his knowledge of the physical environment, the engineer had other knowledge of the great danger prevalent at the crossing. After admitting (R. 237) that the

crossing was "what you might say a place that we went over pretty fast", the record shows he knew that the motoring public generally was unaware of the perilous nature of the intersection. His testimony on page 243 shows that during his two years as engineer on this train, he personally had experienced many near accidents and collisions with automobiles at this crossing.

Although the engineer and fireman testified that the train bell was ringing and the whistle was blowing, not one motorist intended to be warned, approaching the track from the direction of Ocala as was Mrs. Pidd, heard any warning until the engine of the train was too close to the intersection to reduce its speed. Mrs Enos testified (R. 96,97) that as she and Mrs. Pidd approached the crossing, they heard the train whistle and Mrs. Pidd immediately applied her brakes, holding them on continuously until the car came to rest. It is evident that Mrs. Pidd heard the whistle of the train for the first time some 90 or 100 feet from the point of collision for the braking marks from her tires on the pavement commenced some 83 feet 5 inches from the point of collision (R. 148).

Both occupants of the car following Mrs. Pidd's testified that they suddenly saw the tail lights of the Pidd car go on and simultaneously heard a noise which they did not identify or recognize at that time and which they could not identify until they actually saw the train. They also testified that the tail light on the Pidd car stayed on continuously until it came to a stop (R. 60-62, 114). This testimony of the motorists who were approaching this crossing from the direction of Ocala and who were the motorists, among others, intended to be warned by the whistle, is not negative testimony in any sense. They do not say that they did not hear the whistle. Their testimony is that when they did hear the whistle they could not recognize it as a train whistle.

The railroad blandly asserts as an established fact that its employees in the engine were keeping a proper lookout as

they approached the crossing and did all they reasonably could to avoid the collision. This contention is not borne out by the testimony of the fireman who was riding on the left side of the engine and was charged with maintaining a look-out to the left side of the train.

The fireman testified (R. 219, 220) that when he first saw Mrs. Pidd's car it was about 150 feet from the crossing and that at this time his engine was around 250 feet from the crossing. With Mrs. Pidd's car approaching the track at around 30 miles per hour or at the rate of 45 feet per second, this means that when the fireman first saw her, her car was about three and one-half seconds in time away from the track. Taking the testimony most favorably to the railroad and assuming that the train was running at 50 miles per hour, this means that it was approaching the crossing at the rate of 75 feet per second and that it also was about three and one-half seconds in time away from the intersection (R.211-212). Although the fireman testified that he watched the car from the time it first appeared, he said the train was only 15 or 20 feet from the crossing when he first "realized the car was in peril" (R. 222).

In this three and a half seconds of time, Mrs. Pidd, wholly unfamiliar with the crossing, had to comprehend that the train was bearing down on her, that the track of the train was not, as she undoubtedly had expected, on the far side of the third railroad warning sign, but was on the near side, and then take steps to avoid an impending collision. The testimony shows that she reacted immediately by applying her brakes and maintaining her application continuously up until the time her car was hit by the train.

The fireman on the other hand, during those three and a half seconds, sat dumbly in his cab, safe and secure, watching her attempt to bring her car to a halt. It was not until her car had actually stopped on the track, when the train was some 15 to 20 feet away, that he even bothered to tell

the engineer that he thought he was going to hit the car. The fireman knew or should have known that Mrs. Pidd was in peril long before his train was only 15 or 20 feet from the crossing. Every other witness who testified realized that she was in peril from the time she applied her brakes some 90 or 100 feet from the crossing. While the precious seconds slipped by, he vacillated, conjecturing on the outcome. *He did not take any steps whatsoever to avoid the collision until he was certain that the train would hit the car.*

Less than a half second in time remained when the fireman finally warned the engineer. Even then the engineer did not bother to apply the emergency brakes; he testified (R. 238) that when the fireman warned him of the impending collision, he took his foot off the "dead man" pedal resulting in a heavy service application of the brakes. This, despite the fact that the operators of the train well knew that after the engineer took his foot off the "dead man" pedal, the brakes would not actually take effect until some 2 or 3 seconds thereafter (R. 241, 209), during which time the train would travel at least another 150 feet before starting to slow down.

The railroad, in emphasizing Section 320.45, Florida Statutes, pays only lip service to the correct rule in Florida with respect to the duties of a motorist at a crossing as set forth in *Atlantic Coast Line Railroad Company v. Timmons*, 160 Fla. 754, 36 So. 2d 430. There the Supreme Court of Florida held that the law of Florida does not require a motorist approaching a railroad crossing to stop his vehicle in all instances and under all circumstances, but that such a motorist is required to look and listen, the duty to stop depending on circumstances revealed by looking and listening.

The Court of Appeals after reviewing the facts and exhibits in evidence, found that the evidence would support a finding that both parties were negligent, but that it was for the jury to say "which of these parties failed to exercise care commensurate with the circumstances, or whether they both

failed" (R. 380). Cited in support were both Florida and Fifth Circuit cases, including *Lowry v. Seaboard Airline Railroad Co.*, 171 F. 2d 625.

ARGUMENT

As both the opinion below (R. 379) and the railroad's petition (page 7) correctly state, contributory negligence of the automobile driver in Florida railroad cases is not a complete defense. Under the comparative negligence doctrine (Section 768.06, Florida Statutes), if the negligence of both parties proximately contributed to the accident, the plaintiff still may recover, but the amount of recovery is reduced in proportion to the automobile driver's negligence.

We discuss below the reasons why we believe this Court should not grant the railroad's petition.

POINT ONE. Petitioner has failed to demonstrate that the Court of Appeals has used a standard of care which conflicts with the decisions of the Supreme Court of Florida; and in fact no such conflict exists.

Although petitioner urges that the Court of Appeals in this case has used a standard of care which is inconsistent with the standard of the Supreme Court of Florida, we have yet to find in the railroad's petition and brief any statement whatever setting forth the supposed standard of either Court.

The standard of the Supreme Court of Florida in railroad crossing cases is simply one of reasonable care under all the circumstances and conditions existing at the crossing at the time of the accident. The Florida Court has announced and applied that standard in literally scores of decisions. It is well expressed in *Atlantic Coast Line Railroad Co. v. Watkins*, 97 Fla. 350, 121 So. 95 (1929), as follows:

"The question of negligence in the operation of a train

> is one which must be resolved by a consideration of many things. The condition of the machinery and track in relation to the speed at which the train is driven; the environment at the point of the accident where it occurred at a crossing; the speed of the train in relation to the fixed or temporary environment at the spot where the accident occurred; the signals given of the train's approach - - are matters to be considered in determining the question whether the train was operated negligently. The phrase 'all ordinary and reasonable care' is susceptible of no hard and fast definition. What may be ordinary and reasonable care in some circumstances may not be so in another case; and where ordinary and reasonable care is not exercised the presumption of negligence of course is not overcome. Negligence has been defined by this court to be the failure to observe for the protection of another's interest such care, precaution and vigilance as the *circumstances* justly demand, and the want of which causes him injury." (Citing Florida cases).

After holding that the relation between a railroad company operating a train and a traveler on a public highway desiring to cross the railroad track at a crossing involves reciprocal rights and obligations, the Supreme Court of Florida says:

> "All railroad crossings where the highway and railroad track intersect are dangerous in a sense, but some are more dangerous than others due to nearby embankments, trees, houses, and cars standing on side tracks which obscure or at least interfere with the view of the engineer or fireman in control of the train, rendering it impossible or difficult to see an approaching traveler on the highway on the one hand and which obscures the view by a traveler on the highway of an approaching train, on the other. The railroad company's employees in charge of an approaching train should use all ordinary and reasonable care to avoid injury

> to a traveler on the highway desiring to cross the track while the latter must use at least as high degree of care to avoid injury to himself; and the degree of care required depends necessarily upon the conditions existing at each crossing at the moment when a train is approaching it.
>
> "A mere perfunctory blowing of a whistle and ringing of a bell at or near a crossing to give warning of an approaching train where it is being driven under such circumstances and at such speed as to reduce the so-called warning of its approach to its minimum value for the prevention of injury to a traveler on the highway desiring to cross the track of the railroad may not be sufficient to discharge the obligation of the railroad company at such time and place."

The crossing in *Watkins* was obstructed by trees and houses, interfering with the view of both train operators and the motorist. Although the train was blowing its whistle as it approached the crossing, the Court pointed out that the testimony of the engineer exhibited such an unsusceptible sense of duty as to amount almost to callous indifference. He knew that the crossing under usual conditions was a dangerous one and was rendered more so on the occasion of the accident by the presence of some cars on the sidetrack. Neither the engineer nor the fireman could see the highway to the eastward or a traveler upon it who might appear to be desirous of crossing. The engineer knew that people had been killed at the crossing. On the day in question the train was running late; the engineer had been driving his engine at about 50 miles an hour as he approached a curve preceding the crossing, had reduced speed going around the curve and then was increasing his speed back up to 50 miles per hour as he approached the crossing.

The Florida Court, after reviewing the facts, said:

> "We are unable to say, in view of the evidence, that the defendant company used all ordinary and reasonable care necessary to relieve it of liability."

The railroad has made the same contentions throughout the instant case as it made in the recent case of *Atlantic Coast Line Railroad Company v. Smith,* (Fla.), 53 So. 2d. 301, decided June 29, 1951. In affirming a judgment for the plaintiff for personal injuries received in a collision between the defendant's locomotive and the plaintiff's automobile at a heavily traveled and obstructed crossing, the Supreme Court of Florida said:

> "Appellant contends that the speed of its train at the time of the accident was under control, that it was ringing the bell and sounding the whistle and that since all evidence to the contrary was negative, it should have been held to be exercising reasonable care. To support this contention it relies on Seaboard Air Line Ry. Co. v. Myrick, 91 Fla. 918, 109 So. 193. It is further contended that the judgment should be reversed because defendant brought itself within the rule announced in Atlantic Coast Line R. Co. v. Timmons, 160 Fla. 754, 36 So. 2d 430; St. Louis-San Francisco Ry. Co. v. Earl and Baker, Fla., 49 So. 2d 324; Atlantic Coast Line R. Co. v. Price, Fla., 46 So. 2d 481, and similar cases."

After pointing out that the last cited cases (here also relied on by the railroad) did not necessarily govern a crossing where pedestrians and cars were constantly crossing and danger was potential at all times of the day, the Court said:

> "The care required under such circumstances is one of degree and must be commensurate with the danger prevalent at the crossing. It may not always be enough to blow the whistle and ring the bell, particularly is this true where the tracks of defendant are in a con-

> gested area where the vision is obstructed and various and sundry noises and other distractions are prevalent."

The standard of care applied by the Court of Appeals here is the identical standard in effect in Florida. See the opinion of the Court of Appeals (R. 378) where it is said:

> "The duties and obligations of a railroad company and of a traveler on the highway at a public crossing are mutual and reciprocal. The trains have the right of way, and it is the duty of a highway traveler to give them precedence, but it is also the duty of the railroad company to exercise reasonable care for the safety of travelers on the highway, to give warnings of a train's approach which will be reasonably effective in the circumstances, and to have its train under control appropriate to the circumstances. It is of course the duty of a traveler on the highway to exercise reasonable care for his own safety. The degree of diligence and caution to be exercised by each is such as a prudent man would exercise in the circumstances involved."

The same standard of care was used by the Court of Appeals in *Lowry v. Seaboard Air Line Railroad Co., supra.* There the train was an extra, not running on a usual schedule. A house at the intersection obscured the view between the locomotive and the car until the car came within 67 feet of the track. The intersection was heavily traveled. The train whistle was blown but there was conflict as to whether the signals were adequate. Members of the train crew testified that the train was proceeding at only 25 miles per hour. There was other testimony that the train was running fast, some witnesses estimating as high as 60 miles per hour. Applying the Florida standard of care, the Court said:

> "Was it reasonable care to blow the customary crossing signals so 'calmly' that only one person among the

public intended to be notified of the train's approach heard them? What was the speed of the train? And was it a prudent speed under all the circumstances that then and there existed, including the circumstances that the train was an extra, not on any usual schedule, and the crossing a much used but an unguarded one? These questions are fit to be answered by a jury."

Under a heading entitled "The Crossing Law of the Fifth Circuit Court of Appeals" beginning on page 14 of the petition is the place where petitioner should clearly demonstrate to this Court wherein the Fifth Circuit's standard conflicts with Florida law. Petitioner refers to *Henwood v. Wallace*, a case taken to the Court of Appeals from Louisiana. We do not find *Henwood* in Volume 158 F. 2d as cited, but we hardly believe a case affecting the law of Louisiana contributes anything to this case.

The only Court of Appeals case involving Florida law cited under this heading by petitioner is *Lowry v. Seaboard Airline Railroad Co., supra*, decided in 1948. That is where the Court of Appeals, so petitioner says, first strayed from the Florida standard and set up its own inconsistent standard. That opinion, according to petitioner, still "stands on the books unrebuked."

We ask, unrebuked by whom? Since petitioner was one of the parties, we assume it and its counsel should be familiar with the Florida Court's 1951 decision in *Atlantic Coast Line Railroad Company v. Smith, supra*. In that case, after reviewing the evidence, the Florida Court held there was no logical basis for it to disturb the lower Court's judgment. In addition to citing two other Florida cases, *the Florida Court cited with approval and in support of its own decision the Court of Appeal's decision in the Lowry case*. Since the Florida Court recognizes in *Lowry* no departure from its standard of care and has expressly approved that decision, petitioner's position on

"inconsistent" standards plainly is not supportable.

The opinion of the Court of Appeals in this case was written by Circuit Judge Strum. He served as Justice of the Supreme Court of Florida from March 2, 1925 until March 5, 1931, during which time a number of the Florida cases relied on by petitioner were decided. He was Chief Justice of that Court when he resigned on the latter date to become District Judge for the Southern District of Florida. He was Chief Judge of the Southern District when he was appointed to the Court of Appeals in 1950. The District Judge who tried this case, before his appointment as Judge of the Southern District, served for 4 years as Judge of the Circuit Court, Fourth Judicial Circuit of Florida, the Florida trial Court of general jurisdiction. We believe this Court should conclude that these two Federal Courts know and have properly applied in this case the Florida law. *Spiegel's Estate v. Commissioner*, 335 U. S. 701, 707, 69 S. Ct. 301, 93 L. Ed. 330.

POINT TWO. The asserted conflict arises only from differences in states of fact and not from the application of any principle of law.

Any review of this case necessarily depends upon a detailed and extensive analysis by the Court of the particular facts herein involved. That the railroad simply seeks in this Court another hearing, where it may again obtain a review of the evidence and discuss its own interpretation of and inferences from the facts, is apparent from page 16 of its petition. There the railroad again urges that Mrs. Pidd's actions were the sole proximate cause of the accident. This contention already has been decided three times against petitioner, once by the jury and by the two lower Federal Courts. Both of those Courts have carefully reviewed the facts and have concurred in finding that the evidence supports the jury's verdict that the railroad was negligent.

No useful purpose would be served by discussing the six Florida cases cited by the railroad beginning on page 9 of the petition. They are factually entirely different from this case. The principal cases relied on by petitioner have been distinguished by the Florida Court itself in the *Smith* decision, supra, as not applicable to accidents at obstructed and heavily traveled intersections of great danger. The conflict in standards asserted by petitioner does not arise in the application of any principle of law; the only conflict in decisions shown by petitioner arises solely from differences in states of fact.

Nor does this case involve questions or principles which are important in the public or national interest. No persons will be affected by its outcome except the litigants themselves. Petitioner's assertion that the opinion below will restrict and control "the operation of hundreds of trains every day over thousands of highway grade crossings" is pure sophistry. The opinion below fixes no "standard of train operation." There is no direction to the railroad therein stating how or at what speed it must cross this or any other intersection. All the Court of Appeals has said is that on the particular Saturday afternoon of this accident, at this specific crossing and under the peculiar facts, circumstances and environment shown, the jury was authorized in finding that petitioner did not use the necessary reasonable care required of it. The decision will and can have no bearing on any other accident at the same crossing where different facts and circumstances necessarily will be involved, nor even remotely affect any other crossing of petitioner or any other railroad.

Under this Court's established principles, we respectfully submit that petitioner has not made a case for the granting of certiorari. *United States v. Johnston*, 268 U. S. 220, 227, 45 S. Ct. 496, 69 L. Ed. 925; *Magnum Import Company v. Coty*, 262 U. S. 159, 163, 43 S. Ct. 531, 67 L. Ed. 922; *United States v. Johnson*, 319 U. S. 503, 518, 63 S. Ct. 1233, 87 L. Ed. 1546; *Faulkner v. Gibbs*, 338 U. S. 267, 268, 70 S. Ct. 25, 94 L. Ed.

62; *Wisconsin Electric Company v. Dumore Company*, 282 U. S. 813, 51 S. Ct. 214, 75 L. Ed. 728; *Layne & Bowler Corporation v. Western Well Works, Inc.*, 261 U. S. 387, 393, 43 S. Ct. 422, 67 L. Ed. 712.

CONCLUSION

For the reasons shown above, the petition for writ of certiorari should be in all respects denied.

October 15, 1952.

Respectfully submitted,

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